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SUPREME COURT OF THE UNITED STATES

October Term, 1943

FRANCIS E. BAUMER, ... Petitioner

v.

FRANKLIN COUNTY DISTILLING CO. Inc., - Respondent

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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August 27, 1943.

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FRANKLIN COUNTY DISTILLING CO., INC., - *Respondent.*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This case involves an effort on the part of petitioner to recover *as damages* for an alleged breach of a sales promotion contract certain "commissions" on whiskey which he asserts would have been "shipped into Ohio" by respondent during the remaining term of the contract had it not been breached. The District Court, *upon the evidence,* found *as a fact* that *"the anticipated profits which plaintiff seeks to recover are too highly speculative and not shown with such certainty and definiteness as to permit recovery"* (R. pp. 210, 223). The Circuit Court of Appeals found that *"the evidence in the case*

supports this finding" (R. p. 249). And, further said the Circuit Court:

> "Careful scrutiny of the record discloses no method of calculation by which a judgment could be awarded for substantial damages in any certain amount, without indulgence in that degree of speculation and conjecture which the law does not permit" (R. p. 249).

These concurrent findings of fact may not be disturbed unless plainly without support (General Talking Pictures Corp. v. Western Electric Co., 304 US 175, 82 L. ed. 1273; United States v. McGowan, 290 US 592, 78 L. ed. 522). These findings are amply supported by the evidence. *Petitioner does not even assert that such findings are without substantial support in the evidence.* Such concurrent findings having substantial support in the evidence will now be accepted as unassailable (Alabama Power Co. v. Ickes, 302 US 464, 86 L. ed. 374).

The exact position of petitioner is not clear from the petition. However, it would seem that he again undertakes to assert (as he asserted in both courts below) that it is shown by the evidence that he sustained substantial damages (through loss of profits) as a result of the alleged breach of the contract, and the evidence, while indefinite as to the actual amount of such damages, furnishes a sufficient basis for its approximation. Whether recoverable damages were proven depends upon the facts or the inferences and deduction to be drawn from them. *Both courts below denied such contention of petitioner.* Thus, petitioner seeks, in effect, only a review of the evidence, and it is the rule, as we understand it, that a writ will not be granted merely to review the evidence or inferences drawn from it (General Talking Pictures Corp. v. Western Electric Co., supra; Southern Power Co. v. North Carolina Public Service Co., 263 US 508, 68 L. ed. 413; United States v. Johnson, 268 US 220, 69 L. ed. 925).

THERE EXISTS NO BASIS FOR THE ASSERTION THAT THE CIRCUIT COURT "DISREGARDED" OR "MISAPPLIED" THE PREVAILING LAW OF OHIO WITH RESPECT TO THE RECOVERY OF LOST PROFITS.

Petitioner asserts the Circuit Court in this case "wholly disregarded and misapplied" the prevailing law of Ohio with respect to the recovery of lost profits. In this connection it is sought to leave the impression, so it would seem, that the Circuit Court determined the law of Ohio to be "that future profits were necessarily of such a speculative and conjectural nature they could not be recovered," and that its denial of more than nominal damages to petitioner was predicated upon an application of such rule. Of course, the record affords no basis for such contention.

With respect to, and as constituting its conclusion as to the law of Ohio as to the recovery of lost profits, the Circuit Court said:

> "The damages allowable in the instant controversy must, in conformity with Erie Railroad Company v. Tompkins, supra, be measured within the restrictions established by Ohio law.
>
> "In Rhodes v. Baird, 16 O. S. 573, the Supreme Court of Ohio held that evidence as to the probable future profits from cultivation of a peach orchard was incompetent, for the reason that such evidence did not furnish a basis for the assessment of damages in view of its uncertain, speculative and conjectural character. Again, in Ice Manufacturing Co. v. Iron Works Co., 68 O. S. 229, 235, it was made clear by the State Supreme Court that, in Ohio, the law does not permit recovery of damages which can be ascertained only by speculative methods. See, also, the opinion of Circuit Court of Cuyahoga County in Cowdrick v. Searles, 16 Ohio Circuit Court Reports (N. S.) 280, in which the principal declared in Rhodes v. Baird, supra, was applied.
>
> "In Myers v. The Sunlight Laundry Co., 10 Ohio Appellate Reports, 275, 278, the Court of Appeals for Hamilton County, Ohio, said: 'The rule is well established that while the loss of profits from the interrup-

> tion of an established business may be recovered, where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually is, the anticipated profits of a commercial business are ordinarily too remote, speculative and dependent upon changing circumstances to warrant a judgment for their loss.' "

Under the law of Ohio, as announced by the Supreme Court of Ohio, damages which can be ascertained only by speculative methods are not recoverable (Rhodes v. Baird, supra; Champion Ice Mfg. Cold Storage Co. v. Pennsylvania Iron Works Co., supra). And, with respect to the recovery of lost profits, in Myers v. The Sunlight Laundry Co., 10 Ohio App. 275, the rule is stated to be:

> "The rule is well established that while loss of profits from the interruption of an established business may be recovered, where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually is, the anticipated profits of a commercial business are ordinarily too remote, speculative and dependent upon changing circumstances to warrant a judgment for their loss."

And, again in the later case of Queen Incubator Co. v. Merrell Co., 21 Ohio App. 482, it is said that where—

> "* * * such profits are shown with a *reasonable degree* of certainty, such loss of profits may be the basis of recovery."

Thus, under the law of Ohio, as the Circuit Court held, to be recoverable "lost profits" must be shown with a *reasonable degree of certainty*, and may be recovered only when the *evidence affords a basis for the determination of the amount of such loss with reasonable certainty.*

Petitioner cites the case of Foard v. Severpool, 1 Ohio Opinions 492. The case affords no basis for the contention, as petitioner undertakes to assert, that it announces a rule contrary to the prevailing rule announced in the foregoing Ohio cases with respect to the recovery of lost profits. This

case was decided by the *Court of Common Pleas* of Johnson County, Ohio, a *nisis prius court of Ohio.* It was an action wherein it was sought to recover "lost profits" as damages for the breach of a lease. The defendant contended that the plaintiff had sustained no damages that could be the subject of a legal recovery. After a review of the authorities, the trial judge announced the rule, with respect to the recovery of lost profits, to be:

> "Damages from loss of profits in any such matter is largely a problem of evidence as is contemplated in Section 331 of the Restatement. (1) 'Gains prevented' or profits, are allowed 'to the extent that the evidence affords a sufficient basis for establishing their amount in money with reasonable certainty.' (2) When this cannot be done, then the rule claimed by defendant applies."

It is thus evident that "lost profits" under the law of Ohio, as the Circuit Court held, are recoverable only when the evidence affords a basis for the determination of the amount of such loss with reasonable certainty. The District Court found the "anticipated profits" which petitioner sought to recover to be "too highly speculative" to admit of recovery, and the Circuit Court, upon an application of the foregoing prevailing rule in Ohio, found that the *evidence in the case* supports such finding of the District Court; and such conclusion of the Circuit Court was predicated upon the finding that *the record discloses no method of calculation* by which the amount of the loss, if any, of petitioner might be determined with reasonable certainty * * * "without indulgence in that degree of speculation and conjecture which the law does not permit." Obviously, there exists no basis for petitioner's assertion that the Circuit Court "disregarded" or "misapplied" the prevailing law of Ohio.

THE CONCURRENT FINDINGS THAT THE ANTICIPATED PROFITS WHICH PETITIONER SOUGHT TO RECOVER WERE TOO HIGHLY SPECULATIVE TO ADMIT OF RECOVERY ARE AMPLY SUSTAINED BY THE RECORD.

A discussion of this question necessitates a review of the evidence.

The respondent, at the time of the execution of the involved contract, as well as for several years prior thereto, owned and operated a distillery in Franklin County, Kentucky, and was engaged in the manufacture, sale and distribution of whiskey. Its product was marketed under various (some twenty) brand-names, the best known of which were "99," "Kenner Taylor," "Belle of Franklin," "K. Taylor," "Royal Springs" and "86."

With respect to its liquor dispensing policy, the State of Ohio is a "monopoly" State. It, through its Department of Liquor Control, purchases whiskey direct from the distiller, and then, through State Stores, sells it direct to the consumer (Oh. Rev. Stats., Sec. 6064, et seq.). To get its product in Ohio, a distiller must first make application to the Department, indicating the type, proof, analysis and price of its product. If such application be approved, the product, under the designated brand or brands, is "listed" by the Department for sale in State Stores for a specified "trial" period, and the distiller is permitted to place in bailment in the various State Warehouses a quantity of the "listed" brand or brands. After the whiskey is placed in the State Warehouses, the Department then causes it to be withdrawn and placed in the State Stores for sale to the consumer. The title to the whiskey placed in the warehouses remains in the distiller until it is withdrawn by the Department. At the end of each week the Department issues a Purchase Order and Invoice covering the whiskey withdrawn from the warehouses, and then in due course the purchase price of the whiskey is paid by the Department direct to the distiller.

The Department of Liquor Control is vested with a wide discretion in connection with the administration and control

of the sale of whiskey, and for various reasons may "delist" and discontinue the sale of a brand in the State Stores. Thus, under its regulations, the sales performance of a brand "*during and after*" the trial period *must* "meet or exceed" two hundred cases per month average, of which as a minimum fifty-five per cent must be sold at retail (R. pp. 74, 141). If the sales do not meet the required minimum it will be "delisted" and the further sale of it in the State Stores discontinued (R. pp. 131, 134). Likewise, under its regulations, if a brand fails to meet certain requirements as to price and quality, it will be "delisted" (R. p. 132). As a matter of fact, the Department might at any time "delist" a brand, and require the return of the whiskey in the State Stores and Warehouses to the distiller, for any reason which it in its discretion might deem sufficient (R. pp. 57, 71, 134).

The State through its own stores sells direct to the consumer. *The distiller is not permitted to sell to the consumer, directly or indirectly.* The distiller, though, is permitted to create and stimulate demand for its produce through advertising and the usual methods of "popularizing" a product. Thus, some of the distillers, in addition to advertising, maintain representatives in the larger cities to call upon the bars, hotels and night clubs—wherever whiskey is sold by the drink —and through personal contact stimulate the sale and demand for its product.

For a short time in 1938 the "Kenner Taylor" and "Belle of Franklin" brands of respondent were "listed" in Ohio and sold in the State Stores. However, the sales of these brands did not meet the minimum sales requirement and these brands were "delisted" and their further sale in the State Stores discontinued by the Department as of October 15, 1938 (R. p. 165).

In January, 1940, respondent determined to again place its product for sale in Ohio, and made application to the Department of Liquor Control for the "listing" of its "K. Taylor," "86" and "Belle of Franklin" brands (R. p. 184). Mr. Vollertsen, who was then president of respondent corporation, went to Columbus, Ohio, on several occasions and

appeared before the Department in connection with the matter (R. p. 187). However, he was unable to get the brands "listed." About this time, Mr. Ed Baumer, a brother of petitioner, volunteered to assist the respondent in getting its aforesaid brands "listed" in Ohio. Mr. Ed Baumer conducted a wholesale liquor business in Covington, Kentucky, and for several years had been respondent's distributor in Northern Kentucky. He claimed to have, and evidently did have "connections" in Ohio (R. p. 200). At any rate, in a short time (a matter of a few days) he ascertained that the "K. Taylor" and "Belle of Franklin" brands would be "listed" and so informed respondent (R. p. 73).

After it was ascertained that the brands *would be "listed,"* Mr. Ed Baumer sought to obtain the right to "foster" and "promote" their sale in Ohio. However, he was a resident of Kentucky, and the law of Ohio requires that a representative of a distiller be a resident of that State (R. p. 70). So, it was proposed that the contract should be in the name of his brother, Francis E. Baumer, the petitioner, who was a resident of Ohio (R. pp. 39, 70, 185, 187, 200). The petitioner at that time was engaged in the office equipment business *and had not previously been engaged in or had any experience in the liquor business* (R. pp. 20, 199).

Under date of February 1, 1940, *which was some fifteen days prior to the "official listing" of the brands,* respondent submitted to Mr. Ed Baumer a proposed agreement, in tentative form, between it and respondent (R. p. 186). The proposed arrangement was unsatisfactory to him, in that he thought the commission should be *five* per cent instead of four per cent, for the reason, as he pointed out in his letter of February 3, 1940, that—(R. p. 47).

> "1. You must consider that not less than 1% will have to go for political interests.
>
> "2. And in order to get started properly we will at least have to pay a salesman 3% to make it inviting for a capable man. Therefore, this will leave 1% for our operating cost, maintaining an office and etc."

The Department of Liquor Control on February 15, 1940, approved the "listing" of the "K. Taylor" and "Belle of Franklin" brands, and granted the respondent permission to place such brands in "Bailment Stock." Withdrawals by the Department from "Bailment Stock" for allocation in the State Stores, in accordance with "Bailment Stock Plan," dated February 15, 1940, would begin March 4, 1940 (R. p. 156). With respect to each of the brands it was stipulated that they would *"be given a trial period of ten months to determine consumer acceptance and this period ends December 31, 1940."* And, it was further stipulated that *"during and after trial period the average sale"* of each brand *"must attain a minimum of 200 cases per month, of which an average of 60 per cent* must be in retail sales" (R. pp. 157, 158). The respondent received official notification of the "listing" of the brand on February 24, 1940 (R. pp. 156, 157).

On March 7, 1940, the respondent submitted a new arrangement to Mr. Ed Baumer, and suggested to him that *"if it meets with your approval,* will you please have your brother sign it" (R. p. 187). The arrangement was satisfactory to him, and on March 14, 1940, his brother, the petitioner, signed it (R. p. 21). Such agreement constitutes the contract sued on.

Under the contract respondent assigned to petitioner the Cincinnati Area as his territory, and gave to him the exclusive sales rights in such area for a period of three (3) years, beginning on the 1st day of February, 1940, *subject to certain prescribed terms and conditions.* The first condition was that such sales rights should exist only as to the "K. Taylor" brand as a bottled in bond whiskey and the "Belle of Franklin" brand as a three (3) year old, ninety (90) proof whiskey. *The second condition was that the stipulated commissions were to be paid to petitioner only on whiskey sold by respondent to the Cincinnati Area, known as District "A" of Ohio.* The commissions to be paid petitioner were one (1) per cent *on all whiskey shipped into all districts other than District A,* and five (5) per cent *on all whiskey shipped into District A.* Petitioner under the contract agreed to furnish sufficient man-

power *to foster* the distribution and sale of the brands. The contract contains no provision obligating the respondent *"to ship whiskey"* into Ohio throughout the entire period. *Nor, does it contain any provision for its continuance in the event the brands should be "delisted" in Ohio or the respondent for any other reason found itself in good faith unable to continue to ship these brands into Ohio.* Such contingencies existed at the time of the execution of the contract, and if the parties had contemplated that respondent should be irrevocably bound "to ship" these brands into Ohio throughout the term of the contract, it could and no doubt would have been so provided. Such a provision, so it is thought, may not be supplied by implication. Obviously, the existing uncertainties which beset the whiskey business, and in particular the uncertainties surrounding a continuation of its right to sell these brands in Ohio were such as would have precluded respondent from ever agreeing to such a provision in the contract.

Upon the execution of the contract, the parties proceeded to institute a vigorous sales promotion campaign to maintain the "listing" of the brands. The petitioner, in name at least, employed two salesmen to call upon the bars, hotels and night clubs in the Cincinnati Area and "promote" and "stimulate" the purchase, use and consumption of these brands (R. pp. 24, 86). Mr. Ed Baumer, another brother, Mr. William Baumer, and the petitioner (after office hours) also "worked" the territory (R. pp. 20, 24, 45). Intensive newspaper advertising was maintained (R. p. 164). In addition, the respondent furnished a representative in the districts other than the Cincinnati Area to contact the trade and "promote" the brands (R. p. 164). The campaign was a failure. *Neither of the brands met the "minimum sales requirements"* of the Department (R. pp. 137, 163). The venture was "a grossly unprofitable operation" for both parties from the beginning to the end (R. pp. 164, 168). Advertising and promotional expenses alone actually cost respondent the sum of $5.50 per case on each case sold by it in Ohio (R. p. 164). In addition, petitioner incurred sales expenses (excluding the items of per-

sonal expense said to have been incurred in connection with getting the brands listed) in the amount of $2,791.28 (R. p. 28). Petitioner sustained an actual loss from the operation in excess of $1,800.00.

The respondent, as other small distillers, in the operation of its business was confronted with the problem of competing with the larger, more entrenched distilleries, with greater resources. It was meeting such competition rather unsuccessfully. It, as most small distillers, was not amply financed, and its financial position was not the best. The United States was asserting a large claim against it for taxes. Its whiskey was pledged to secure a substantial portion of the cost of its production (R. p. 147). And, to add to its troubles, a perpetual injunction had been granted against it on March 23, 1940, in the case of National Distillers Products Corporation, et al. v. The K. Taylor Distilling Co., Inc., "restraining the defendant, its agents and servants from using the name 'Taylor' or any phrase of which the name 'Taylor' forms a part, in its corporate name or in any of its whiskey labels or advertising matter, unless accompanied by a statement plainly and specifically showing that the defendant is 'neither the successor to nor connected with the maker of 'Old Taylor' whiskey and that its product is not the product of E. H. Taylor & Sons or its successors." An appeal had been prosecuted from such interlocutory order by the National Distillers Products Corporation, and such appeal was pending in the Circuit Court of Appeals, Sixth Circuit. The aforesaid order also ordered and directed an "accounting" by the respondent, and the case was retained on the docket "for such proceedings as may be appropriate to that end" (31 F. Supp. 617). *The National Distillers Products Corporation was insisting that the District Court proceed with the accounting.*

In June, of 1940, the National Distillers Products Corporation sought to purchase the distillery, whiskey and trademarks of respondent (R. p. 188). The Board of Directors of respondent determined, in view of the existing situation, the best interest of the corporation required that such offer be

accepted. Accordingly, on July 11, 1940, respondent agreed to sell to the National Distillers Products Corporation its entire assets, except cash, receivables, certain whiskey and its "Belle of Franklin" and "99" brands, and to cause its corporate name to be changed to "The Franklin County Distilling Co., Incorporated." The stockholders approved and ratified the sale at a meeting held on August 5, 1940. The sale was consummated on September 12, 1940.

Notwithstanding the sale of its assets as aforesaid, respondent contemplated and intended to continue in the whiskey business (R. p. 176). It so advised the trade. On August 5, 1940, it wrote petitioner, as well as his brother, Mr. Ed Baumer, that "the company under a changed name, which will be the Franklin County Distilling Company, contemplates and proposes to carry on with such whiskey as it has available for the trade insofar as it is possible to do so, and we bespeak your cooperation toward that end" R. p. 42). The respondent had on hand, and later acquired a large quantity of the whiskey which it had manufactured, and was in a position to furnish the trade the same whiskey under its "Belle of Franklin" and "99" brands or any other brand it might adopt (R. p. 176). *It sought to induce both petitioner and his brother, Mr. Ed Baumer, to continue under the contract to "promote" the sale of its product in Ohio* (R. pp. 166, 176). The brand "99" over a period of years had been its best seller, and the respondent proposed, in an effort to induce the petitioner to proceed under the contract, to substitute it for the "K. Taylor" brand in Ohio (R. p. 167). However, petitioner, as well as his brother, Mr. Ed Baumer, took the position that the inability of respondent to furnish its product under the "K. Taylor" label, *notwithstanding that it was in a position to furnish the same whiskey under other brands,* constituted a breach of the contract, and refused to proceed any further under the contract (R. pp. 50, 168, 186). The petitioner, as well as his brother, Ed Baumer, admits that he refused to "go on under the contract" after the consummation of the sale on September 12, 1940 (R. pp. 42, 68).

The "K. Taylor" and "Belle of Franklin" brands remained in the State for sale. However, on March 14, 1941, the Department of Liquor Control "delisted" the "K. Taylor" and "Belle of Franklin" brands as of March 29, 1941, for the reason that "a review of the average case sales per month * * * reveals that the sales of the brands during the trial period did not attain the quota as established by our Bailment Stock Plan and as outlined to you in our letter of February 15, 1940," and directed the return of any inventory on hand (R. pp. 154, 155).

These brands actually remained on the shelves of the State Store until March 29, 1941. When these were "delisted" 110 15/24 cases of the "K. Taylor" brand and 117 18/24 cases of the "Belle of Franklin" brand were returned to respondents (R. p. 163). During such period (from March 1, 1940, to March 29, 1941) only 1589 08/24 cases of the "K. Taylor" brand and 477 06/24 cases of the "Belle of Franklin" brand were sold in the entire State of Ohio (R. p. 162). *Petitioner made no effort to show the number of cases sold in the Cincinnati Area alone during such period.* Petitioner was paid all commissions due him, amounting to $966.59, on all whiskey "shipped into Ohio" during such period (R. p. 164).

During the period from March 4, 1940, to September 12, 1940—the period during which the appellant "fostered" the sales in the Cincinnati Area—1189 4/24 cases of the "K. Taylor" brand were sold in the entire State of Ohio (R. p. 137). *Petitioner made no effort to show the number of cases sold in the Cincinnati Area alone during such period.* The number of cases of the "Belle of Franklin" sold during such period is not shown. The actual monthly sales of the "K. Taylor" brand during the period from March 1, 1940, to September 12, 1940, reduced to cases, were as follows:

MONTHS	QUARTS	PINTS	CASES
MARCH	764	1,358	120 6/24
APRIL	1,550	2,227	221 23/24
MAY	1,985	2,491	269 5/24
JUNE	2,034	1,518	232 18/24
JULY	987	1,257	134 15/24
AUGUST	1,148	1,584	161 16/24
SEPTEMBER	332	505	48 17/24
TOTAL	8,800	10,940	1,189 4/24

The average monthly sales over such period was 185.469 cases per month. The minimum sales requirement under the regulations of the Department during such period was 200 cases per month, of which 120 cases must be in retail sales (R. p. 157). The portion of such monthly sales sold "in retail" is not shown. Obviously, the sale of the "K. Taylor" brand during the period the petitioner was "promoting" and "fostering" its sales did not meet the "minimum sales requirement" of the Department, the repeated assertion of the petitioner to the contrary notwithstanding.

On March 14, 1941—*the very day the Department of Liquor Control "delisted" the brands*—the petitioner filed this action. In it he sought to recover "commissions which he could have earned" in the sum of $58,000.00 as damages for an alleged breach of the contract. In his complaint, he pleads and relies upon the sale by the respondent of its distillery and assets and its resultant inability to market whiskey under the "K. Taylor" label as constituting a breach of the contract. Only a recovery of alleged "lost profits" is involved (R. p. 1). Petitioner expressly disavows any claim "for expenses" in-

curred or alleged to have been incurred in performing or preparing to perform the contract (R. p. 41).

Respondent, denying any breach of the contract or damage to petitioner, as its defense asserted affirmatively that the contract did not by its terms, express or implied, obligate it to continue "to ship" whiskey into Ohio throughout its entire term, and that, since petitioner under the terms of the contract was only entitled to commissions on whiskey shipped into Ohio, its good faith determination to sell its distillery and brands and to discontinue the sale of the "K. Taylor" brand in Ohio did not constitute a breach of the contract (R. p. 8).*

The case was tried before the District Judge without a jury.

Notwithstanding the admitted fact that he sustained an actual loss in excess of $1,800.00 from his operations during the six months period (March 1, 1940, to September 12, 1940) which he "fostered" the brands, petitioner undertook to assert that throughout the remaining thirty (30) months of the term of the contract he would have sold in the Cincinnati Area alone a monthly average of 2,000 cases of whiskey under the "K. Taylor" label (R. p. 36). His brother, Mr. Ed Baumer, was of the opinion that, starting in October, 1940, the appellant would have sold 1,800 cases of the "K. Taylor" label for the months during the remaining term of the con-

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* It was thought that the Supreme Court of Ohio had not passed upon the question of law presented by the respondent's answer. Accordingly, the District Court, upon the authority of Pellet et al. v. Manufacturers & Merchants' Insurance Co., 104 Fed. 502, Wm. S. Gray & Co. v. Western Borax Co., 99 Fed (2nd) 239, Stockton Commission Co., Inc. v. Narragansett Cotton Mills, Inc., 11 Fed. (2nd) 618, and Friede v. White Co., 244 Fed. 272, construed the contract as not precluding respondent from in good faith ceasing to ship whiskey into Ohio, and that the good faith sale by petitioner of its distillery and brands and its resulting inability to ship whiskey into Ohio under the "K. Taylor" brand did not constitute a breach of the contract (R. p. 205). However, the Circuit Court, upon the authority of Suter v. The Farmers Fertilizer Co., 100 O. S. 403, Fosdick v. Green, 27 O. S. 484, and National Pumps Corporation v. American Pumps, Inc., 60 Oh. App. 175, 32 N. E. (2nd) 422, held that the sale by respondent of its distillery and brands and its resultant inability to ship in Ohio whiskey under the "K. Taylor" brand constituted a breach of the contract. As an examination of the Ohio decisions relied upon by the Circuit Court will disclose, much could be said with respect to the correctness of the conclusion reached by it.

tract (R. p. 65). Mr. Julian Hieman, who was one of petitioner's salesmen, testifies that the "K. Taylor" brand was a very popular brand and that in his opinion the sales in the Cincinnati Area would have "tripled" during the remaining term of the contract (R. p. 89). Of course, Mr. Heiman does not disclose the number of cases sold in the Cincinnati Area, and as a consequence his estimate becomes quite vague and uncertain. Such estimate of future sales represents only the opinion or guess of petitioner, his brother, and his employee, *all interested parties.* The records contain no fact or circumstance which may be said to afford any basis for such estimates, and it is quite evident that the estimates of these *parties in interest* are no more than a mere guess.

Some five or six disinterested whiskey dealers were introduced by petitioner. However, of the various whiskey dealers introduced, only petitioner, his brother, Mr. Ed Baumer, and his employee, Mr. Julian Heimam, were willing to even hazard a "guess" as to the number of cases of whiskey under the "K. Taylor" label which would be sold during the remaining thirty months term of the contract. Thus, W. S. Richard, a former Sales Manager of respondent and who at the time he testified was litigating with it over a contract of employment, testified that the sales of the "K. Taylor" brand, after it was put in Ohio, "started going up by leaps and bounds." However, when asked to fix in percentage the probable increase in the sales of the brand over the remaining period of the contract, his reply was that, "I am afraid to say" (R. p. 94). Mr. Sam Bauer, who operates a cafe in Cincinnati, testified that the "K. Taylor" brand was a "good seller" and in his opinion "would have been the best seller in Cincinnati." However, when asked to give his opinion as to the percentage which its sales would increase over the remaining period of the contract, he replied *"I cannot answer that.* It was selling very good *but I cannot forsee three years"* (R. p. 109). Mr. Ike Hymans, who had been in the whiskey business 20 years, testifies that the "K. Taylor" brand was a good whiskey and in his opinion its sales would have increased. He does not undertake to fix the amount of the increase (R. p. 117).

However, with respect to the future of a brand, Mr. Hymans said, *"I have seen them come and go. Some stay and some are not much in demand. Whiskey business is like that"* (R. p. 116). Mr. Frank E. Bevier, who was the manager of a bar, testifies that the "K. Taylor" brand was a popular brand and in his opinion the demand for it would have increased (R. p. 122). Mr. Bevier readily admits that many brands start off in a *spurt and then fall back,* and that, as he said, *"it all depends on the tavern keeper, whether he pushes a certain brand."* Also, he said "it depends on advertising" (R. p. 123).

These men were in the whiskey business. Each of them had been engaged in it for a long number of years. Each, as far as we know, were disinterested, although friends of petitioner. If it were possible to estimate with any degree of certainty the future sales performance of a particular brand of whiskey, it would seem that men such as these, with long experience in the business, could and would be willing to do so. But, much to the contrary, we see each of these experienced whiskey men declining even to hazard a "guess" as to the future sales performance of the "K. Taylor" brand. One cannot escape the significance of their refusal to do so. If these men, experienced as they were in the business, were on their oaths unwilling to even hazard a guess as to the future sales performance of the brand, upon what basis may it be said that the court, in its effort to administer justice, would be justified in doing so.

Petitioner was permitted, over the objection of respondent, to show the past sales performance of the "K. Taylor" brand in Kentucky (R. p. 81). W. S. Rogers, who operated a wholesale liquor business in Lexington, Kentucky, testified that his sales of the "K. Taylor" brand, to approximately 1,800 retailers in Central and Eastern Kentucky, increased from 70 cases in March, 1939, to 765 cases in July, 1941 (R. O. 82). Mr. Ed Baumer, who, as we have stated, operated a wholesale liquor business in Covington, Kentucky, testified that his sales of the "K. Taylor" brand increased from about 50 cases a month to about 600 cases a month (R. p. 62). Of course, the conditions under which whiskey was sold in Ken-

tucky were much different from those under which it would be sold in Ohio. We have serious doubts as to the materiality of such testimony. But, whether so or not, it is evident, so it is thought, that the demand which a wholesaler might be able to create for a brand in Kentucky would not in any wise reflect upon the consumptive which one "fostering" the same brand in Ohio, under entirely different conditions, might be able to create for the same brand during the same period of time. As illustrative of such fact, we find that Rogers sold, in a few counties in Kentucky, during the period from March 1, 1940, to August 31, 1940, approximately 3,000 cases of the "K. Taylor" brand, while during the same period only 1,189 cases of the "K. Taylor" brand were sold in the entire State of Ohio. A comparison of the sales performance of the "K. Taylor" brand in States other than Ohio illustrates the soundness of such conclusion (R. p. 103).

Thus, the evidence for petitioner, in its finality, comes down to proof showing that the "K. Taylor" brand was "a good seller" or "popular" in the Cincinnati Area, and the unsupported opinion or "guess" of the *parties in interest* that 1,800 or 2,000 cases would have sold each month during the remaining term of the contract.

It is admitted that petitioner did and would have been required to incur considerable expense in "fostering" the sale of these brands. However, *he made no attempt to establish with any accuracy the amount of such operating expenses.* He did not (for some reason) present such books as he had, if any, reflecting his operations (R. p. 41). Of course, there could be no determination of the "profit" from the operation until and unless the operating expenses were determined. With respect to the "profit" which he would have made, petitioner testified: (R. p. 46)

> "118. After paying all these salaries and commissions and so forth, you would not have made anything, would you?
>
> "A. I would have at least forty per cent."

"119. Forty per cent of the net, you mean?

"A. Well, would have at least twenty per cent or *ten per cent; mark it down to ten per cent.*"

It is quite evident that such estimate on his part was nothing more than a pure guess.

It is rather patent that the opinion or guess of the *parties in interest* that 1,800 or 2,000 cases of the "K. Taylor" brand would have been sold each month during the remaining 30 months of the term of the contract is without probative value. A brand of whiskey does not attain a sustained demand over night. The creation and maintenance of a sustained demand on the part of the consuming public involves a long and costly effort. The National sales record of the "K. Taylor" brand did not indicate a rosy future for it. As a matter of cold fact, respondent was only able to sell, in some twenty states, during the 18 month period from March 1, 1939, to September 30, 1940, only 33,140 cases of such brand, of which a total in excess of 12,000 cases were sold in Kentucky (R. p. 103). Notwithstanding, petitioner asserts that in a like period he could and would have sold in excess of 36,000 cases in the Cincinnati Area alone.

The "K. Taylor" brand actually remained on the shelves of the State Stores for a period of approximately six months after petitioner refused to further "foster" its sale, and during such six months period (from September 12, 1940, to March 29, 1941) only approximately 400 cases of "K. Taylor" brand were sold. If the brand had attained such "popularity" as petitioner would have you believe, obviously the sales during such period would have far exceeded 400 cases. Likewise, the further fact that only 1,589 cases of the "K. Taylor" brand were sold in the entire State of Ohio during the twelve months period, beginning March 1, 1940, and ending March 29, 1941, would seem to definitely refute any idea as to the popularity of such brand.

It is said, and we assume it to be true, that the "Old Taylor" and "Old Jordan" brands were the best selling brands in Ohio. It is interesting to note that during the twelve

months period, beginning September 1, 1940, and ending August 31, 1941, that in the entire State of Ohio only 7,767 cases of "Old Taylor" and 10,737 cases of "Old Jordan" were sold (R. p. 137). Thus, it is evident that there exists no earthly basis for the assertion of petitioner, his brother, and his salesman that 20,000 to 24,000 cases of the "K. Taylor" brand would have been sold during such period in the Cincinnati Area alone.

An analysis of the monthly sales of the "K. Taylor" brand during the twelve month period, beginning March 1, 1940, and ending March 29, 1941, discloses another material fact. Look at the chart showing actual bottle sales on page 137 and the chart showing monthly withdrawals on page 161. As you will see, in July the actual bottle sales, as well as the withdrawals from the warehouses, began to decline and thereafter gradually declined to substantially no sales or withdrawals. Such a decline in sales reflects, as is said in the liquor business, a loss in "repeats"—that is, the brands were new brands in Ohio and through the early months—March, April, May and June—their extensive newspaper advertising had created a desire on the part of the consuming public to "try a bottle" and as a consequence the initial sales were high. However, the lack of "repeat sales" indicates that the sales campaign failed to create a sustained "consumer demand" for the product—as ofttimes happens in the whiskey business.

Petitioner undertakes to explain the small consumption of the "K. Taylor" brand and his operation at a loss during the six months period which he "fostered" it, upon the idea that the consumption of whiskey in the spring and summer months is much less than in the fall and winter months (R. p. 30). Thus, it is that petitioner, as well as his brother, Mr. Ed Baumer, predicate their estimate of future consumption of the "K. Taylor" brand "beginning as of October 1st" would have been not less than 2,000 cases per month (R. p. 65). But, as a matter of cold fact, the "K. Taylor" brand remained on the shelves of the State Stores until March 29, 1941, and during such period (from October 1, 1940, to March 29, 1941) less than 400 cases were actually sold. Such fact

only further demonstrates the entire lack of probative value of the so-called "opinion" or "guess" of petitioner, his brother, and his salesman as to the future consumption of the brand.

The whiskey business has long been beset with many, many uncertainties. Success is the unusual, rather than the usual. Regulation, taxation and the continual prohibition fight place it in a category quite different from that of an ordinary commodity. The instability of demand by the consuming public for a particular whiskey in a particular locality is one of the unexplainable realities of the business. Any man in the whiskey business recognizes its existence. The inability to make a reasonably accurate forecast of the future consumption of a particular brand of whiskey has long been an accepted fact.

The "K. Taylor" brand was a new one. It had been put on the market only in March, 1939. The "Belle of Franklin" brand had been "delisted" in Ohio in 1938 (R. p. 165). At the time of the execution of the contract both brands were only "listed" in Ohio for a trial period of ten months (R. p. 156). A continuation of the sale of the brands in Ohio was beset with many uncertainties. The brands, under the regulations of the Department, would be "delisted" unless the requirements as to minimum monthly sales, price and quality were satisfactorily met. Then, in addition, respondent was confronted with the possibility of the Department of Liquor Control, in the exercise of the wide discretion which it had with respect to the control of the sale of whiskey, requiring the sale of whiskey in Ohio under conditions so burdensome as to render it impractical or impossible for it to continue to do business in the State. The ability of respondent to meet the requirements of the Department with respect to price presented a real problem, and especially so in view of the rising prices and taxes. If it failed to meet the requirements as to price, then the brands would be "delisted." The many existing uncertainties upon which a continuation of the sale of the brands in Ohio was predicated were present actualities, and these uncertainties, when considered in connection with the fact that petitioner sustained a substantial loss during the

six months period which he sponsored the brand, render it quite evident that there could exist no reasonable basis upon which it may be said, with any degree of certainty, that petitioner would have ever made a dime of profit out of the contract. As a matter of fact, it is rather evident, so it is thought, that it was the very unsatisfactory sales performance of respondent's products during the time petitioner "fostered" it which prompted petitioner to abandon the contract, rather than the inability of respondent to furnish whiskey under the "K. Taylor" label.

The District Court, sitting without a jury, upon a consideration of the evidence found *as a fact* that "the anticipated profits" which petitioner sought to recover were "too highly speculative" and not shown with "such certainty and definiteness" as to admit of recovery (R. pp. 210, 223). Judge Swinford saw the witnesses, heard them testify, and had an opportunity to judge their credibility, and his evaluation of their testimony may not "be set aside unless clearly erroneous." It is rather evident, so it is thought, that the uncertainties surrounding the right of a continuation of the sale of a brand in Ohio, as well as those surrounding any estimate of the future consumption of the brand in Ohio were such as to impel the conclusion reached by the District Court. It may not be said that the evidence does not amply sustain such conclusion, as the Circuit Court held (R. p. 249).

Petitioner again contends, as he contended in both courts below, upon the authority of Story Parchment Company v. Paterson, 282 US 535, 75 L. ed. 544, that the prevailing rule with respect to the recovery of damages only requires that the fact that substantial damages were sustained as a result of the breach of a contract be shown with certainty, and that where the fact of damage is shown with certainty a substantial recovery in damages will not be denied merely because of any uncertainty as to the actual amount of such damage. Thus, it is upon such basis that petitioner contends, as we understand it, that the refusal of the Circuit Court to allow more than nominal damages for the reason that the record disclosed "no method of calculation by which a judgment could be

awarded for substantial damages, in any certain amount, without indulgence in that degree of speculation and conjecture which the law does not permit" was error.

The rule asserted by petitioner does not exist. Story Parchment Company v. Paterson, supra, announces no such rule. Of course, where the fact of damage is shown with certainty, a recovery will not be denied merely because the amount of such damage may not be calculated with absolute exactness. However, the rule is that, even where *the fact of damage be shown with certainty, to be recoverable the evidence must afford "a basis for a reasoned conclusion"* as to the amount of such damage, as distinguished from a mere guess. Thus, in Palmer v. Connecticut R. & Light Co., 311 US 544, 85 L. ed. 336, it is said:

> "The ways compensatory damages may be proven are many. The injured party is not to be barred from a fair recovery by impossible requirements. The wrongdoer should not be mulcted, neither should he be permitted to escape under cover of a demand for nonexistent certainty."
>
> *"Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion."*

It is not shown with any degree of certainty that petitioner sustained any damage as the result of the breach of the contract. It is quite evident, so it is thought, that he would not ever have made a "dime" out of the contract. He sustained a substantial loss during the time he undertook to "foster" the consumption of the brand in Ohio. He was only devoting "his spare time" to the business. His expenses in the operation of the business were in an amount such as would require the sale and consumption of nearly three times as much whiskey as was consumed during the five month period which he operated to enable him to even meet his expenses. The District Court found that the very nature of the product, its constant subjection to moral attacks, the public policy of regulatory measures for its maximum taxation and regulation,

and "the speculative character of consumptive demand, especially for a new brand, made it impossible to predict what quantity of any particular brand would be sold in a given area within a specified time." The Circuit Court found that "the evidence in the case supports" such finding of the District Court (R. p. 249). The record affords no basis upon which one may conclude with any degree of certainty that the consumptive demand for the brand in the Cincinnati Area would have ever been such as to enable petitioner to make a profit.

Furthermore, even if it should be said that the evidence justifies the conclusion that petitioner lost any profits as the result of the breach of the contract, the many uncertainties surrounding the right of respondent to continue to offer its product for sale in Ohio, as well as the uncertainties of the future consumption of the brand were such as to preclude one from reaching any "reasoned conclusion" as to the amount of such loss. The evidence fully sustains the conclusion of the Circuit Court that "the record discloses no method of calculation by which a judgment could be awarded for substantial damages, in any certain degree of speculation and conjecture which the law does not permit."

CONCLUSION

The facts and the deductions to be drawn from them are in conflict in many material respects. Such evidence abundantly sustains the concurrent findings of the courts below that the "profits" which petitioner sought to recover were "too speculative" to admit of recovery. Petitioner now seeks no more than a review of such evidence, and a writ will not be granted for such purpose.

Petitioner was inexperienced in the business. He was only devoting his "spare time" to the business. He had sustained a substantial loss in his operations under the contract. The consumption of the brand did not reflect the enormous advertising and promotional expenditures which had been made. Add to this, the uncertainty of the liquor business, the

free hand the Department had to "delist" the brands and oust the company out of the State, and the further uncertainty of takes, taxation and prohibitive laws and regulations which surround the liquor business, and it would take a far stretch of the imagination to conclude that respondent would have made any profit out of the contract, even if the brands had been left with him and he had been uninterferred with in the pursuance of his course.

It is thought the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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